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No. 91-1773

Supreme Court, U.S.
JUN 3 1992
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

IN RE MOBILE COMMUNICATIONS CORPORATION OF AMERICA, INC. CONSOLIDATED LITIGATION

AARON FLECK, *et al.*,

Petitioners,

—against—

MOBILE COMMUNICATIONS CORPORATION OF AMERICA, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Is a state court obliged to exclude federal claims from a general release given by the class representative in a class action settlement approved by the court?

2. Did the Supreme Court of Delaware properly hold that members of a shareholder class, certified pursuant to Delaware's equivalent of Fed. R. Civ. P. 23(b)(1) and 23(b)(2), were not entitled to "opt out" of the class where (a) the class action was based on principally equitable claims; (b) all class members were homogeneously situated with respect to all issues of liability and relief; and (c) the class was composed exclusively of the shareholders of a corporation incorporated in Delaware?

PARTIES TO THE PROCEEDING

The following are the parties to this proceeding and the proceeding in the Delaware Supreme Court whose judgment is sought to be reviewed:

The petitioners, appellants in the Supreme Court of Delaware, are Aaron Fleck, Ada Fleck, Irene Mirman, Sandler Associates, L.P., and Daniel E. McCarthy.

The respondents, appellees in the Supreme Court of Delaware, are BellSouth Corporation;* Mobile Communications

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* The corporate subsidiaries (except wholly-owned subsidiaries) and affiliates of BellSouth Corporation are: BellSouth Marketing Programs, Inc.; ITT World Directories, Inc.; ITT World Directories (U.K.) Ltd.; Promedia B.V.; Inter-Team Societe de Services SA; Permatel SA; Euromessage Limited; Band Three Holdings Limited; Optus Communications Pty Limited; Movicell S.A.; Movicom S.A.; Telcell S.A.; TCIL BellSouth Limited; B.A. Celular Inversora S.A.; Moviles S.A.; DMT Dansk Mobiltelefon I/S; Compagnie Financiere pour le Radiotelophone S.A.; TelSouth Limited; Compania de Radiocomunicaciones Moviles S.A.; Comunicaciones Celulares de Occidente, S.A. de C. V.; PCN One Limited; Communication-Developpement S.A.; Raynet International, Inc.; ROU Celular Inversora S.A.; Abiatar S.A.; TelCel Celular, C.A.; Uniquest Incorporated; Green Bay Cellular Telephone Company; Kenosha Celltelco Partnership; Madison Cellular Telephone Company; Muncie Cellular Telephone Company, Inc.; National Cellular Communications, Inc.; Terre-Haute Cellular Telephone Company, Inc.; Kokomo Celltelco Partnership; Gulf Coast Cellular Telephone Company; Bloomington Cellular Telephone Company; Charisma Communications Corp. of the Southwest; Houston Mobile Cellular Communications Company; Houston Cellular Telephone Company; Galveston Mobile Partnership; Gary Cellular Telephone Company; Honolulu Cellular Telephone Company; Cellular Systems; MCTA; Janesville Cellular Telephone Company, Inc.; Los Angeles RCCs, Inc.; Los Angeles Cellular Corporation; Los Angeles Cellular Telephone Company; Racine Cellular Telephone Company; Sheboygan Cellular Telephone Company, Inc.; RCTC Wholesale Company; RAM Mobile Data USA Limited Partnership; Acadiana Cellular General Partnership; Huntsville MSA Limited Partnership; Centel Cellular Company of Hickory; Centel Cellular Company of North Carolina; Centel Cellular Company of Tallahassee; Century Cellunet of North Louisiana; Cellular Limited Partnership; Chattanooga MSA Limited Partnership; Decatur RSA Limited Partnership; Jacksonville MSA Limited Partnership; Florida RSA No. 1 Limited Partnership; Florida RSA #2B

Corporation of America;* Mobile Telecommunication Technologies Corporation;** Xavier W. Nady; John W. Palmer; C. Victor Raiser, II; Thomas G. Barksdale; R. Faser Triplett, M.D.; Salvatore J. Albano; E. Lee Walker; Regina T. Monahan and Marshall Wolf.

(Indian River) Limited Partnership; Georgia RSA No. 1 Limited Partnership; Georgia RSA No. 2 Limited Partnership; Georgia RSA No. 3 Limited Partnership; Baton Rouge MSA Limited Partnership; Lafayette MSA Limited Partnership; Louisiana RSA No. 7 Cellular General Partnership; Louisiana RSA No. 8 Limited Partnership; Memphis SMSA Limited Partnership; Nashville/Clarksville NSA Limited Partnership; Northeast Mississippi Cellular, Inc.; Orlando SMSA Limited Partnership; Columbia MSA Limited Partnership; South Carolina RSA No. 4 Cellular General Partnership; South Carolina RSA No. 5 Cellular General Partnership; and South Carolina RSA No. 6 Cellular General Partnership.

* Mobile Communications Corporation of America's only subsidiary or affiliate that is not a wholly-owned subsidiary is Skilldex, Inc.

** The corporate subsidiaries (except wholly-owned subsidiaries) and affiliates of Mobile Telecommunication Technologies Corporation are CMA-Skytel do Brazil Telecommunicacoes, S.A.; Communicaciones Mtel S.A. de C.V.; Global Page Pte. Ltd.; Mtel Space Technologies, LP.; Sky Telecom Services, Ltd.; Skytel Corp.; Skytel Services (Malaysia) Sdn. Bhd.; Thai Page Pte., Ltd.; Advanced Interactive Systems, Inc.; American Mobile Satellite Consortium, Inc.; Atlanta MDS Company; Miami MDS Company; New York MDS, Inc.; Phonelink Co. Ltd.; River Communications, Inc.; St. Louis MDS Company; Shinawatra Paging Service Co. Ltd.; and Texas MDS Company.

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STATEMENT OF THE CASE

This action arises from a February 1988 agreement providing for the acquisition by merger of respondent Mobile Communications Corporation of America ("MCCA"), a Delaware corporation, by respondent BellSouth Corporation ("BellSouth"). That agreement provided, among other things, that (i) immediately prior to the merger, MCCA would distribute to its shareholders all of the stock of an MCCA subsidiary owning businesses that BellSouth would not acquire, and (ii) in the merger, each share of MCCA would be converted into shares of BellSouth stock worth $28.75. The merger agreement was subject to a number of conditions, including receipt of regulatory approvals. MCCA shareholders, by the affirmative vote of 89% of those shares voted, approved the agreement in August 1988, following a proxy solicitation in which MCCA issued a proxy statement to each shareholder of record. The proxy statement reprinted the merger agreement and summarized its terms. A16-19.*

In February 1989, while regulatory approvals were still pending, BellSouth commenced an action in the Court of Chancery for the State of Delaware, seeking a declaratory judgment that the merger agreement was binding and enforceable and that no event that would permit termination had occurred. A20-21. Several shareholders of MCCA—including all petitioners—then commenced four actions in the Court of Chancery (thereby submitting to the Court's jurisdiction, although no state or federal rule required that choice of forum). These shareholder actions sought to enjoin MCCA from completing the merger; each action named MCCA, its directors and BellSouth as defendants,** and

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* Citations to petitioners' appendix are in the form A ___. Respondents note that the reproduction in petitioners' appendix of the Delaware Court of Chancery's Order and Final Judgment, dated February 6, 1991, erroneously numbers the paragraphs in the Order consecutively from "VI" through "XI." *See* A81-85. The paragraphs should be consecutively numbered "1" through "6."

** Also named as defendant in one of the actions was BLS Acquisition Corp., a Delaware corporation formed and owned by BellSouth for the pur-

each was purportedly brought on behalf of all MCCA shareholders. The shareholder actions, and BellSouth's declaratory judgment suit, were consolidated by the Court. A21.

The shareholder actions asserted that, by reason of an alleged increase in the value of MCCA subsequent to the signing of the February 1988 merger agreement, the directors of MCCA were obligated as fiduciaries—and were allegedly permitted by the merger agreement—to abandon the merger and seek a superior acquisition offer for the company. The defendants denied the material allegations of the shareholder complaints; MCCA and its directors took the position that, in light of the merger agreement's express "no shop" provision and narrowly drawn termination clause, the merger agreement could be terminated only if MCCA received an unsolicited acquisition offer and if the Board determined, on the advice of counsel, that it was required by its fiduciary duties to accept that offer. The shareholder plaintiffs did not dispute that no such offer had been received and that the merger agreement barred solicitation of such an offer.

The shareholder plaintiffs, including petitioners, moved in the Court of Chancery for a preliminary injunction against the merger and took discovery in support of that motion. The plaintiffs argued (and petitioner Sandler Associates, L.P., amended its complaint to allege) that if the MCCA directors were not permitted to abandon the agreement, then the MCCA proxy statement soliciting shareholder approval of the merger would have been misleading, in violation of the MCCA directors' duty of candor under Delaware law, because it would have failed to disclose such an interpretation of the merger agreement. A22.

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pose of implementing the merger with MCCA, and named in three of the actions was Mobile Telecommunications Technologies Corp., a Delaware corporation, formed and owned by MCCA, whose stock was to be distributed to the MCCA shareholders prior to the merger. Certain directors of BellSouth were named as defendants in one of the actions, but were never properly served with process.

On March 29, 1989, the Court of Chancery denied plaintiffs' motion for a preliminary injunction. In its opinion, the Court observed that "[t]his case, as refined by the presentation of counsel at oral argument, presents at this stage principally a question of the adequacy of the disclosure made in the joint solicitation of proxies in connection with the MCCA shareholder approval of the Agreement." A91. The Court found that the merger agreement could not be interpreted to permit termination merely on the basis of an asserted change in the value of MCCA. The Court held that by reprinting and accurately summarizing the terms of the agreement, the proxy statement had fully and fairly disclosed those terms. The Court explained that, among other things, "none of the disclosures made to shareholders reflect[ed] an inaccurate statement concerning the scope or meaning" of the termination provision of the agreement, A94; no relevant fact or conclusion had been omitted from the proxy statement, A94-96; and the proxy statement could not be said to have contributed to a mistaken interpretation that the agreement granted the MCCA directors "a broad 'fiduciary out.' " A98-99.

An agreement to settle the consolidated actions was reached on April 1, 1989. A23. The settlement agreement, conditioned upon Court of Chancery approval as required by Chancery Rule 23(e), provided that, in consideration of a release from any liability to the class with respect to the merger, the defendants would increase the value to the MCCA shareholders, on a share by share basis, of the merger and related stock distribution by (1) increasing the number of BellSouth shares to be received by each MCCA shareholder in the merger, (2) timing the merger so that the MCCA shareholders would receive the cash dividend declared by BellSouth for the first quarter of 1989, and (3) increasing the capital of the MCCA subsidiary whose stock was to be distributed immediately prior to the merger. A24-25. The Chancery Court found that these benefits aggregated in the range of $35 million in value. *See* A9; A57.

Petitioners, all represented by the same counsel, refused to agree to the settlement or even to participate in the final round of settlement discussions. A8. They instead applied for leave to appeal from the denial of the shareholder plaintiffs' preliminary injunction motion, and for a stay of the merger pending that appeal. A6. Their application was denied on April 3, 1989 by the Court of Chancery, which observed that this had been "one of the weakest cases legally for the issuance of a preliminary injunction that I have ever encountered in the court." A7. The Supreme Court of Delaware rejected petitioners' interlocutory appeal application on April 4, 1989. A8-9. After the Supreme Court announced its ruling, MCCA completed the stock distribution to its shareholders contemplated by the merger agreement, and then merged with a subsidiary of BellSouth. A9; A25. By this date, all conditions to the merger had been satisfied.

On June 6, 1989, the settling parties moved in the Court of Chancery for an order, under Chancery Rule 23(e), approving the settlement on behalf of a class certified under Chancery Rules 23(b)(1) and 23(b)(2) (equivalent to Fed. R. Civ. P. 23(b)(1) and 23(b)(2)). The settling parties also moved for an order directing that notice of a hearing on the settlement motion be provided to all members of the proposed class. Petitioners demanded that the settlement be summarily rejected and that they be appointed class representatives. On August 14, 1989, the Court of Chancery rejected these demands and scheduled a hearing on the settlement, upon notice to all proposed class members. The Court granted petitioners the right to conduct limited discovery concerning the settlement, and to include a statement of reasons for their objections to the settlement in the hearing notice.

Nine days later, petitioners Sandler Associates and Daniel McCarthy—who had personally invoked the jurisdiction of the Delaware courts, but whose proxy misrepresentation claims had now been preliminarily rejected and whose efforts to be appointed class representatives had been unsuccessful—commenced an action in the United States District Court for the District of Delaware, purportedly on behalf of a class

including all MCCA shareholders. The action, in which petitioners Sandler Associates and McCarthy were represented by the same counsel as in the Delaware Court of Chancery, named as defendants BellSouth, MCCA and all but one of the former directors of MCCA—all also defendants in the pending Court of Chancery action. The federal complaint repeated the allegations about the MCCA proxy statement that had previously been made in the Court of Chancery, though now framed as purported violations of the federal securities laws. The federal complaint also alleged that the directors of MCCA had breached fiduciary duties in completing the merger and in agreeing to settle the Court of Chancery action. The federal complaint prayed for compensatory damages of "at least $800,000,000" and treble damages under the Racketeer Influenced Corrupt Organizations Act of "at least $2.5 billion." A26.*

At the same time, even after seeking to move litigation of their claims to a federal forum, petitioners continued to participate in the Court of Chancery action, maintaining their objections to the proposed settlement, inserting in the class notice a statement of reasons for their objections, and taking discovery in support of those objections. Petitioners also submitted briefs prior to and presented oral argument at the settlement hearing, which was held on January 18, 1990.

On January 7, 1991, the Court of Chancery, in a detailed opinion, ruled that the consolidated shareholder action was properly maintained as a class action under Chancery Rules 23(b)(1) and 23(b)(2), and that (with one modification not here relevant) the settlement was fair and reasonable to the class. The Court rejected petitioners' argument that due process required that class members be given the right to opt

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* Defendants in the federal action have filed answers denying liability and have advised the District Court that they intend to seek dismissal of the action on grounds of release and *res judicata* should the Order of the Court of Chancery become final and non-reviewable. *See generally Nottingham Partners* v. *Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991). The District Court has not required defendants to proceed to discovery or otherwise defend on the merits.

out of the class and that a state court could not approve a release unless it excluded federal claims. The Court also rejected petitioners' attack upon the good faith of the settling parties. A56-57. On February 6, 1991, the Court entered an Order and Final Judgment certifying the class, approving the settlement and dismissing the consolidated action with prejudice.

On February 4, 1992, the Supreme Court of Delaware, upon appeal by petitioners, affirmed the Order of the Court of Chancery, for the reasons set forth in the Court of Chancery's January 7, 1991 opinion.*

REASONS FOR DENYING THE WRIT

I.

THE DELAWARE SUPREME COURT PROPERLY HELD THAT A CLASS ACTION RELEASE NEED NOT EXCLUDE FEDERAL CLAIMS, AND THAT DECISION DOES NOT CONFLICT WITH A DECISION OF THE HIGHEST COURT OF ANY OTHER STATE OR ANY UNITED STATES COURT OF APPEALS.

The Court below approved a class action release that did not exclude federal claims. This holding does not conflict with the decision of any other state's highest court or federal Court of Appeals. Indeed, it is well settled that a state court

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* Respondents have not attempted to respond here to each assertion of supposed "fact" in petitioners' Statement of the Case, but rather only those relevant to this Court's consideration of the petition. Respondents note, however, that petitioners' version of events—*e.g.*, that "the Merger Agreement would, in effect, provide BellSouth with an irrevocable call to purchase MCCA at a below-market price"; that "BellSouth made a secret pact with the settling plaintiffs and with the MCCA defendants"; that the settlement below provided only "nuisance value consideration"; that the Court of Chancery viewed the plaintiffs' state disclosure claims "as a narrow and technical matter"; that the MCCA directors were self-interested and lacked good faith—is unfounded and was rejected by the Supreme Court of Delaware and the Court of Chancery. *See, e.g.*, A27-47; A50-67; A75-76; A98-99.

has authority to approve a class action settlement releasing claims under the law of another jurisdiction—including claims within the exclusive jurisdiction of the federal courts. Thus, in *Nottingham Partners* v. *Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991), the First Circuit expressly determined that state courts (there, Delaware) had power to "approve and enforce a settlement which requires a party to release claims actually brought, or potentially 'bringable,' in federal court under 'exclusive jurisdiction' federal statutes," *id.* at 34—in that case, as in the Court below, the federal securities laws, *id.* at 30, 33-34. *See also TBK Partners, Ltd.* v. *Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 221 (5th Cir. 1981), *cert. denied*, 456 U.S. 998 (1982); *Abramson* v. *Pennwood Inv. Corp.*, 392 F.2d 759, 762 (2d Cir. 1968); *In re Washington Power Supply Sys. Sec. Litig.*, 720 F. Supp. 1379, 1413 (D. Ariz. 1989), *aff'd*, 955 F.2d 1268 (9th Cir. 1992).

Petitioners attempt to avoid these authorities, *first*, by ignoring altogether the First Circuit's decision in *Nottingham Partners* and, *second*, by seeking to distinguish the other cases on the purported ground that "they all involved suits brought primarily as derivative actions and not shareholder class actions." Pet. Br. 36. This purported "distinction," however, is a blatant misstatement of the relevant facts in those cases. *See Nottingham Partners* v. *Dana*, 564 A.2d 1089, 1091 (Del. 1989) (appeal concerned "the decision to approve the Settlement and the certification of a Rule 23(b)(2) class"); *TBK Partners*, *supra*, 675 F.2d at 459 (appeal concerned whether "the District Court erred in approving a settlement that barred class members from pursuing appraisal proceedings in state court"); *In re Corrugated Container Antitrust Litig.*, *supra*, 643 F.2d at 202 ("we consider two district court orders approving settlements between plaintiff-class representatives and twenty-four of the thirty-seven defendants"); *In re Washington Power Supply Sys. Sec. Litig.*, *supra*, 720 F. Supp. at 1412-13 (addressing settle-

ment between "Class Plaintiffs and the State of Washington").*

Moreover, both *National Super Spuds, Inc.* v. *New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981), and *Dunlop* v. *Pan American World Airways, Inc.*, 672 F.2d 1044 (2d Cir. 1982), emphasized by petitioners, are inapposite. *National Super Spuds* only held that class representatives cannot agree to release claims arising from different factual circumstances than those underlying their own claims. 660 F.2d at 16-18.** *Dunlop* only held that the Secretary of Labor could not settle state claims on behalf of a class he represented where the statute authorizing the class action expressly provided that "the Secretary has absolutely no power to extinguish . . . state claims [or] state statutory rights," 672 F.2d at 1049 & n.7—a restriction that plainly does not apply in a shareholder class action.

Indeed, *National Super Spuds* itself made clear that a class settlement *can* release claims "relying on a legal theory different from that relied upon in the class action complaint but depending upon the very same set of facts." 660 F.2d at 18 n.7. And in *TBK Partners*, *supra*—decided *after* both *National Super Spuds* and *Dunlop*—the Second Circuit confirmed that "a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action *even though the claim was*

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* *Kincade* v. *General Tire & Rubber Co.*, 635 F.2d 501 (5th Cir. 1981), which petitioners also attempt to distinguish on this ground, similarly "involve[d] a class action brought . . . by six named plaintiffs on behalf of a class consisting of more than 500 members." *Id.* at 503. *Abramson* v. *Pennwood Inv. Corp.*, *supra*, did address the settlement of a shareholder derivative action, but did not suggest that its holding was limited to that context. 392 F.2d at 760.

** Specifically, the class representative in *National Super Spuds* had liquidated his "long position" in May 1976 Maine potato future contracts between April 13 and May 7, 1976, and his class claim concerned all contracts that had been liquidated during the same period. The Court held that a settlement of the class action could not bar claims concerning unliquidated contracts and liquidated contracts that had not been liquidated during that period. *National Super Spuds*, *supra*, 660 F.2d at 16-18.

not presented and might not have been presentable in the class action." *TBK Partners*, 675 F.2d at 460 (emphasis added).*

In this case, the purported federal claims clearly arose from and concerned "the very same set of facts" as the class' state law claims—including the claim that MCCA's directors breached their "duty of complete candor" to shareholders by purportedly misrepresenting the terms of the merger agreement in the proxy statement soliciting shareholder approval of the merger. *See* A91 ("[t]his case . . . presents at this stage *principally a question of the adequacy of the disclosure made in the joint solicitation of proxies* in connection with the MCCA shareholder approval of the Agreement") (emphasis added).** *See also Nottingham Partners*, *supra*, 925 F.2d at 33.

Petitioners' purported argument that the settlement below could not include federal claims is, indeed, "jejune," *Nottingham Partners*, *supra*, 925 F.2d at 33, and does not justify a grant of certiorari.***

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* *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979), also cited by petitioners, involved a settlement of a class action for damages under Fed. R. Civ. P. 23(b)(3), in the extraordinary procedural context where the district court purported to dismiss federal claims of class members whether or not they accepted settlement benefits or agreed to an individual release embracing both federal and state claims. The Court of Appeals found the settlement defective on a number of procedural and substantive grounds, principally that the form of settlement subverted the opt out rights of the Rule 23(b)(3) class members. *Id.*, 594 F.2d at 1123-37. The case has never been understood to hold that the scope of a class release must be limited to the subject matter jurisdiction of the court in which the class action was brought.

** Notably, the Delaware law relied on by the Court of Chancery (A90-100) provides that alleged breaches of the duty of candor in connection with a proxy statement are governed by the standards applicable to proxy disclosure claims under the federal securities laws. *See Rosenblatt* v. *Getty Oil Co.*, 493 A.2d 929, 944-45 (Del. 1985) (*citing TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976)).

*** As discussed, *infra*, petitioners' suggestion that they were "absent shareholders," whose "only connection . . . to the state court litigation is

II.

THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF THIS COURT, AND DOES NOT CONFLICT WITH THE DECISIONS OF THE HIGHEST COURT OF ANY OTHER STATE OR ANY UNITED STATES COURT OF APPEALS, ADDRESSING THE DUE PROCESS RIGHTS OF CLASS MEMBERS.

A. The decision below is consistent with *Shutts*.

The decision below is fully consistent with the decisions of this Court, including *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), setting forth the procedural rights of absentee class members under the Due Process Clause. The Court below held that members of a shareholder class were not entitled to "opt out" of the class where, unlike in *Shutts*, (a) the class was certified under a state rule equivalent to Fed. R. Civ. P. 23(b)(1) and 23(b)(2); (b) the consolidated actions were based on principally "equitable" claims; (c) all class members were homogeneously situated with respect to all issues of liability and relief; and (d) the class was composed exclusively of the shareholders of a corporation incorporated in the forum. (Here, moreover, each of the petitioners was not "absent" from the litigation forum, but instead *invoked* the personal jurisdiction of the Delaware courts by *commencing* litigation in that forum.)

As this Court explained in *Hansberry* v. *Lee*, 311 U.S. 32 (1940), class actions raise an exception to the general rule

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through the implied agency relationship with the class representative to litigate claims which could be brought in state court," Pet. Br. 37, is not only beside the point, but is also misleading. Indeed, petitioners here were the first MCCA shareholders to *commence* an action in the Delaware Court of Chancery, and petitioners chose to pursue their disclosure claims concerning the MCCA proxy statement in that forum. It was only after petitioners' preliminary injunction motion was denied in the Court of Chancery, and only after that Court refused to permit petitioners to block consideration of the settlement, that petitioners Sandler Associates and Daniel McCarthy commenced an action in federal court seeking relief under the federal securities laws on the same proxy disclosure issues.

that a person "is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Id.* at 40. *Hansberry* established that absent class members can be bound by a decree as long as the named parties adequately represent the absent class and the prosecution of the litigation is within the class' common interest. *Id.* at 41; *see also Shutts*, 472 U.S. at 808.

In *Shutts*, this Court applied the principles articulated in *Hansberry* to one particular type of class action: an action "at law" wholly or predominantly for monetary damages, brought on behalf of individuals with legally *distinct* claims presenting common questions of law or fact, and certified under a state rule analogous to Fed. R. Civ. P. 23(b)(3).* Such class actions do not involve a genuine "class" of persons homogeneously affected by the subject matter of the suit; rather, such actions, historically labelled "spurious," have principally been viewed as an economical means to resolve various related legal claims without the unduly burdensome (or prohibitive) process of formally joining all interested parties. *See* Advisory Committee Note to 1966 Revision of Fed. R. Civ. P. 23 (hereinafter "Advisory Committee Note"), 39 F.R.D. 98, 102-03 (1966).

Indeed, prior to the adoption in 1966 of modern Fed. R. Civ. P. 23 (and the adoption soon thereafter of analogous rules in various states), the outcomes in "spurious" class actions were binding only on those absentee plaintiffs who affirmatively opted to join the class. *See id.* at 99; *see also* 3B *Moore's Federal Practice* ¶ 23.30 at 23-234 (1992). The 1966 amendments to Fed. R. Civ. P. 23, and the analogous revisions of the law in various states, eliminated this "opt in" requirement, and now permit such actions to be maintained on behalf of those absentee plaintiffs who decline

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* The distinct nature of the individual claims in *Shutts* was reflected in the dispute over which substantive law should apply, given that the individual gas leases at issue were located in various states and held by class members who had, with limited exception, "no apparent connection" to the litigation forum. *Shutts*, *supra*, 472 U.S. at 814-15, 816-23.

to "opt out." *See* Fed. R. Civ. P. 23(c)(2); 3B *Moore's Federal Practice*, *supra*, ¶ 23.31[1] at 23-235.*

In *Shutts*, this Court held that such an opt-out right could satisfy the requirements of Due Process in the type of "23(b)(3)" class action involved in that case. This Court reasoned that the "absentee" plaintiffs there—that is, plaintiffs who had no contacts with the litigation forum sufficient otherwise to establish personal jurisdiction, *see International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945)—were entitled to "opt out" of the class, and that those who did not "opt out" had given sufficient "consent" to allow final adjudication of their claims in the litigation forum. *Shutts*, *supra*, 472 U.S. at 812-14.

As petitioners do not dispute, however, this Court expressly limited its holding in *Shutts* to the type of class action before it. The Court "intimate[d] no view concerning other types of class actions, such as those seeking equitable relief," *Shutts*, 472 U.S. at 811 n.3, or those brought on behalf of individuals with joint or otherwise homogeneous claims—the very types of class actions at issue in the Court below.

In fact, as reflected in modern Federal Rule 23, absentee plaintiffs in such "homogeneous" class actions—actions now authorized by Rules 23(b)(1) and 23(b)(2) and their state analogs**—have never been deemed to have separate and

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* In place of the old "spurious" class action, Fed. R. Civ. P. 23(b)(3) now authorizes—assuming the prerequisites of Rule 23(a) have been satisfied—maintenance of a class action where "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). *See* 3B *Moore's Federal Practice*, *supra*, ¶ 23.31[1] at 23-235 ("[t]his is the modern version of the old spurious class action").

** Assuming the prerequisites of Fed. R. Civ. P. 23(a) have been satisfied, Rule 23(b)(1) authorizes maintenance of a class action where "the prosecution of separate actions by or against individual members of the class

distinct interests requiring Due Process protection through either an "opt in" or "opt out" procedure. *See* Fed. R. Civ. P. 23(c); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177 n.14 (1974); Advisory Committee Note, *supra*, 39 F.R.D. at 98; 3B *Moore's Federal Practice*, *supra*, ¶ 23.30 at 23-233. And shareholder class actions seeking injunctive relief or damages for violations of corporate shareholders' common rights have always been recognized as the type of "joint" or "homogeneous" actions properly certified as 23(b)(1) or 23(b)(2) class actions—and, as such, have consistently bound absentee plaintiffs without any requirement that the absentee "consent" to jurisdiction either by "opting in," or not "opting out," of the class.*

Moreover, a jurisdictional nexus exists in any event where, as here, the class is composed exclusively of shareholders of a

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would create a risk of (a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." Rule 23(b)(2) authorizes maintenance of a class action where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

* *See, e.g.*, *TBK Partners, Ltd.* v. *Western Union Corp.*, *supra*, 675 F.2d at 460 n.4 (2d Cir. 1982) (class claims relating to alleged undervaluation of reversionary interest owed to corporation's shareholders); *McDonald* v. *Chicago Milwaukee Corp.*, 565 F.2d 416, 435 (7th Cir. 1977) (class actions on behalf of holders of corporate debt); *Fradkin* v. *Ernst*, 98 F.R.D. 478, 490-91 (N.D. Ohio 1983) (alleged violation of rules of corporate conduct "has had a similar effect upon all members of the shareholder class"); *Van Gemert* v. *Boeing Co.*, 259 F.Supp. 125, 130 (S.D.N.Y. 1966) (class action by debenture holders claiming right of conversion into common stock of defendant corporation); Advisory Committee Note, *supra*, 39 F.R.D. at 101 (citing pre-revision cases). *See also First Alabama Bank of Montgomery, N.A.* v. *Martin*, 425 So. 2d 415, 423 (Ala. 1983), *cert. denied*, 461 U.S. 938 (1983) (class action by beneficiaries of trust alleging breach of duties by trustee); *In re Resorts Int'l Shareholders Litig. Appeals*, 570 A.2d 259 (Del. 1990); *Nottingham Partners* v. *Dana*, 564 A.2d 1089 (Del. 1989).

corporation incorporated in the forum. Courts in the incorporating state have always had power to determine the obligations of both resident and nonresident holders of stock in domestic corporations: it comports with fair play and substantial justice to permit the state of incorporation to exercise jurisdiction over nonresident shareholders to adjudicate claims arising from their common shareholder rights.* Indeed, with a rationale equally applicable to corporations, this Court has expressly recognized that nonresident trust beneficiaries may be bound by an adjudication, concerning the trustee's duties, in the jurisdiction that is the situs of the trust.**

The decision below—to uphold certification of the shareholder class under Delaware Chancery Rules 23(b)(1) and 23(b)(2), without provision for opt-out—is thus fully consistent with the principles that have guided this Court's Due Process analysis.

The class actions consolidated below, including the actions commenced in the Court of Chancery by petitioners, raised predominantly equitable claims based on homogeneous rights of all MCCA shareholders as a class (rather than on distinct rights of each class member). This is true not only with respect to plaintiffs' state law claims for alleged violations of

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* *See, e.g., Pink* v. *A.A.A. Highway Express, Inc.*, 314 U.S. 201, 207-08 (1941) (it "involves no want of due process" that "those who become stockholders in a corporation subject themselves to liability for assessment when made in conformity with the statutes of the state of its organization"); *Christopher* v. *Brusselback*, 302 U.S. 500 (1938); *Bernheimer* v. *Converse*, 206 U.S. 516 (1907). *See also Hynson* v. *Drummond Coal Co., Inc.*, 601 A.2d 570, 575-79 (Del. Ch. 1991).

** *See Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (noting "the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts"). *Cf. CTS Corp.* v. *Dynamics Corp. of America*, 481 U.S. 69, 94 (1987) (internal affairs of corporation, including "defining the attributes of shares . . . and protecting shareholders," are governed by the law of the corporation's domicile); *Kamen* v. *Kemper Financial Services*, ___ U.S. ___, 111 S. Ct. 1711, 1717 (1991).

fiduciary duties commonly owed to all shareholders,* but also true with respect to the federal proxy claims. Such proxy claims are rooted in equity and plainly support equitable relief. *See Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 386 (1970) ("[i]n selecting a remedy the lower courts should exercise 'the sound discretion which guides the determinations of courts of equity' "; "[p]ossible forms of relief will include setting aside the merger or granting other equitable relief"); *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 430-33 (1964); *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corp.*, 480 F.2d 341, 391 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973). As this Court observed in *J.I. Case Co.* v. *Borak*, *supra*, "[t]he injury which a stockholder suffers from corporate action pursuant to a deceptive proxy solicitation . . . results not from the deceit practiced on him alone but rather from the deceit practiced on the stockholders *as a group.*" 377 U.S. at 432 (emphasis added). The Court below thus recognized that the federal proxy claims included within the scope of the general release below, like the shareholders' state law claims, "involve one set of actions by defendants creating a uniform type of impact upon the class of stockholders." A72-73.

It is also readily apparent that neither the closing of the MCCA/BellSouth merger (which the class originally sought to enjoin) nor the subsequent pursuit of monetary relief by certain plaintiffs below, created for class members an otherwise nonexistent Due Process right to opt out of the class. The alleged wrongdoing giving rise to the class claims, including the federal proxy claims, still impacted uniformly on all class members (on a share per share basis) even after the merger closed. The merger did not cause the state fiduciary duty

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* As the Chancery Court noted in its opinion adopted by the Court below, "typically an action challenging the propriety of director action in connection with a merger transaction is certified as a (b)(1) or (b)(2) class because plaintiff seeks equitable relief (injunction); because all members of the stockholder class are situated precisely similarly with respect to every issue of liability and damages (*compare Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985)); and because to litigate the matters separately would subject the defendant to the risk of different standards of conduct with respect to the same action." A68-69.

claims and federal proxy claims to lose their equitable nature and become claims "at law"; those claims continued to be rooted in equity, and the alleged wrongdoing continued to affect all shareholders "as a group," even after "the merger was . . . consummated." *See Borak*, *supra*, 377 U.S. at 429.* Similarly, the jurisdictional nexus between MCCA shareholder class members and Delaware—MCCA's state of incorporation—remained intact after the merger. All class members had voluntarily become shareholders of a Delaware corporation—and, furthermore, petitioners each had voluntarily commenced litigation in the forum.**

Moreover, the federal courts have long recognized that claims for monetary relief can be pursued by a class certified under Rules 23(b)(1) or 23(b)(2), *see, e.g.*, *Parker* v. *Local Union No. 1466, United Steelworkers of America*, 642 F.2d 104, 107 (5th Cir. 1981); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 801-02 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971); *Lynch* v. *Sperry Rand Corp.*, 62 F.R.D. 78, 85

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* Petitioners' suggestion that rescinding the merger would be difficult, or even "virtually impossible," does not mean that other forms of equitable relief—*e.g.*, disgorgement—would be foreclosed, or that, in any event, the underlying equitable and homogeneous nature of the class claims would be eviscerated.

** Petitioners do not (and cannot) provide any support for their assertion that they were "forced" to commence their class action in the Court of Chancery because BellSouth had previously filed an action in that Court seeking a declaratory judgment that the merger agreement was binding and enforceable. No rule in Delaware or any other jurisdiction compelled petitioners' choice of forum, and it is well established that commencement of a declaratory judgment action in one state court does not necessarily operate to bar actions subsequently filed in the courts of another state or federal jurisdiction. *See, e.g.*, *General Foods Corp.* v. *Cryo-Maid, Inc.*, 198 A.2d 681, 683-84 (Del. 1964); *see also Williams Gas Supply Co.* v. *Apache Corp.*, 594 A.2d 34, 36 (Del. 1991). Furthermore, any claim that petitioners were forced to litigate in state court because they had not discovered their proxy disclosure claims is belied by the fact that (a) petitioner Sandler Associates *amended* its state complaint to include proxy disclosure claims once it "discovered" that the proxy statement was purportedly false and misleading; and (b) petitioners Sandler Associates and Daniel McCarthy only chose to bring a federal action *after* the Delaware courts indicated strong doubts about the merits of those claims.

(S.D.N.Y. 1973), and that the mooting of particular injunctive relief does not necessitate a change in class status or the imposition of opt-out rights. *See, e.g., Wetzel* v. *Liberty Mutual Ins. Co.*, 508 F.2d 239, 250-53 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975) ("[T]he procedural protections of (b)(3), opting out and notice, are necessary because of the heterogeneity of the (b)(3) class. [Even after the mooting of injunctive relief, t]hey are unnecessary for the homogeneous (b)(2) class"); *Arkansas Ed. Ass'n* v. *Bd. of Ed.*, 446 F.2d 763, 768 (8th Cir. 1971).*

B. The decision below does not conflict with *Colt Industries* or *In re Real Estate Title*.

Consistent with the decision below, the New York Court of Appeals held in *In the Matter of Colt Industries Shareholder Litig.*, 77 N.Y.2d 185, 566 N.E.2d 1160, 565 N.Y.S.2d 755 (1991), that "when a class action complaint demands predominantly equitable relief that will necessarily benefit the class as a whole if granted, the Trial Judge is not required to give class members the opportunity to opt out of the class." 77 N.Y.2d at 187, 566 N.E.2d at 1161, 565 N.Y.S.2d at 756. Like the Court below, the New York Court of Appeals rejected the argument, made by petitioners here, that *Shutts* compels such an opt out provision. 77 N.Y.2d at 192-96, 566 N.E.2d at 1163-66, 565 N.Y.S.2d at 758-61. The New York Court of Appeals similarly rejected as a "faulty premise" the contention that consummation of the merger there at issue mooted the class's equitable claims or thereby converted the

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* Even assuming that the class below might also have been certified as a Rule 23(b)(3) class, the federal civil rules and their state analogs, such as Delaware's, contemplate that a class shall be certified under 23(b)(1) or 23(b)(2) whenever possible. *See, e.g., Wetzel* v. *Liberty Mutual Ins. Co., supra*, 508 F.2d at 253 ("We . . . agree . . . with the . . . principle that an action maintainable under both (b)(2) and (b)(3) should be treated under (b)(2) to enjoy its superior res judicata effect and to eliminate the procedural complications of (b)(3) which serve no useful purpose under (b)(2). This principle has been widely adopted in the federal courts"); *Van Gemert* v. *Boeing Co., supra*, 259 F. Supp. at 130-31. *See also* 3B *Moore's Federal Practice, supra*, at ¶ 23.31[3] (citing cases); H. Newberg, 1 *Newberg on Class Actions* § 4.20 at 310-12 (2d ed. 1985).

entire action into one for damages. 77 N.Y.2d at 191-92, 566 N.E.2d 1163-64, 565 N.Y.S.2d at 758-59.

It is true, as petitioners state, that the New York Court of Appeals also held in *Colt Industries* that "the Trial Judge erred in approving a settlement agreement insofar as it purported also to extinguish the respondent's right to pursue a cause of action in damages." 77 N.Y.2d at 187-88, 566 N.E.2d at 1161, 565 N.Y.S.2d at 756. That holding, however, does not conflict with the decision below, for it only "applied to the facts of [that] case"—namely, where the objecting class member was "absent" and did "not possess minimum contacts with New York State," 77 N.Y.2d at 187, 196, 566 N.E.2d 1161, 1166, 565 N.Y.S.2d at 756, 761. The shareholder class action at issue did not involve a New York corporation, and the objecting class member had no other contacts with the forum. The Court of Appeals emphasized that the "lack of contacts with New York troubles us enormously." *Id.*

In the Court below, by contrast, all class members were shareholders of a corporation incorporated in the Delaware state forum, and those class members seeking to litigate in another forum—*i.e.*, petitioners—had *consented* to personal jurisdiction by commencing the litigation in the Delaware state forum. The Due Process concern that motivated the decision in *Colt Industries*—the objector's "lack of contacts with New York"—was plainly absent in the Court below.

Similarly, the holding below creates no conflict with *In re Real Estate Title & Settlement Services Antitrust Litig.*, 869 F.2d 760 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989). That case actually upheld a decision to deny opt out rights to members of a class seeking both injunctive relief and damages. The further holding—that an objecting class member could not be enjoined from relitigating in another court the issue of whether it had been adequately represented in the class action, 869 F.2d at 765-70—addressed a question not even raised in the Court below, where no such injunction was granted. That particular holding, in any event, was prem-

ised on the findings that the objecting class member (i) had no minimum contacts with the forum and (ii) also had not consented to jurisdiction in the forum. *Id.* at 769. Any purported conflict with *In re Real Estate Title*, or its rationale, is a false conflict indeed.

C. This is an inappropriate case in which to address whether class members are entitled to "opt out" rights in "b(1)/b(2)" class actions.

Courts and commentators alike have recognized that an opt out requirement would undermine the objectives of the class actions contemplated by Federal Rules 23(b)(1) and 23(b)(2) and their state law analogs. *See, e.g., Wetzel* v. *Liberty Mutual Ins. Co., supra*, 508 F.2d at 252-53 ("[t]his . . . would defeat the fundamental objective of (b)(2), to bind the members of the class with one conclusive adjudication"); *Nottingham Partners* v. *Dana, supra*, 564 A.2d at 1101; *Van Gemert* v. *Boeing Co., supra*, 259 F. Supp. at 130; 3B *Moore's Federal Practice, supra*, ¶ 25.35[2] at 23-250-51. To impose a mandatory opt out requirement for 23(b)(1) and 23(b)(2) type actions in state court, even were such a requirement limited to non-resident plaintiffs lacking constitutionally sufficient contacts with the forum, would dramatically disrupt the class action scheme incorporated in the Federal Rules and adopted by a number of states.*

The decision below presents no occasion for this Court to consider such a drastic result, and the petition should therefore be denied.

It is also questionable whether petitioners, who were not "absentees," even have standing to bring this petition on behalf of absentees not now before this Court. Petitioners themselves, as plaintiffs, invoked the jurisdiction of the Dela-

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* *See, e.g.*, Ala. R. Civ. P. 23; Ariz. R. Civ. P. 23; Colo. R. Civ. P. 23; Del. Ch. Ct. R. 23; D.C. Sup. Ct. R. Civ. P. 23; Ind. R. Trial P. 23; Kan. Stat. Ann. § 60-223; Ky. R. Civ. P. 23; Me. R. Civ. P. 23; Minn. R. Civ. P. 23; Mo. Sup. Ct. R. 52.08; Nev. R. Civ. P. 23; N.D. R. Civ. P. 23; Ohio R. Civ. P. 23; Okla. Stat. tit. 12, § 2023; Tenn. R. Civ. P. 23; Tex. R. Civ. P. 42; Vt. R. Civ. P. 23; Wash. Civ. R. 23.

ware state forum that entered the judgment that they now seek to escape; chose to assert and actively litigate in that Delaware forum the same disclosure allegations they now seek to litigate in a federal forum; sought to abandon the Delaware forum they chose only after their interlocutory injunction motions were twice denied; and, even after invoking the jurisdiction of the federal forum, continued to litigate actively in the Delaware forum, pursuing their demand to be named class representatives and threatening all the while to press their federal action should the outcome in the Delaware action not be to their liking.

At bottom, this petition is little more than an effort to facilitate forum shopping between the federal and state courts—forum shopping that began only after the Delaware courts preliminarily rejected petitioners' claims, including their proxy disclosure claims. Petitioners now disparagingly assert that Delaware state courts "typically allow corporations incorporated in that state broad freedoms to eviscerate shareholder rights," Petition at 1, ignoring the historic role of those courts in developing such rights, and in the area of corporate governance generally. *See, e.g.*, *Kamen* v. *Kemper Financial Services*, __ U.S. __, 111 S. Ct. 1711 (1991) (citing Delaware decisions concerning shareholder derivative litigation). This Court should not aid litigants whose conduct has been so inimical to the principles governing the relationship between the federal and state courts.

III.

THE PETITION IS PREMATURE.

This petition is premature in any event. The effect on petitioners' federal claims of the settlement approved by the Court below has yet to be decided in the United States District Court for the District of Delaware, where those federal claims are pending, or in any other court. Nor has any allegedly "absent" class member sought to maintain, or been barred from maintaining, any claim released by the settle-

ment. Petitioners acknowledge the "possible future availability of a collateral challenge to the settlement," Pet. Br. 40 (a challenge that respondents would oppose). As the Court of Chancery recognized, "a federal court in which a released claim is pending or is brought always remains free to adjudicate the effect of the release." A74. *See also Nottingham Partners* v. *Trans-Lux Corp.*, *supra*, 925 F.2d at 33-34.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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